

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IGNACIO POLVOS PENA,

Petitioner,

vs.

D. K. SISTO, Warden,

Respondent.

No. C 07-03056 JW (PR)

ORDER TO SHOW CAUSE

Petitioner, a state prisoner incarcerated at the California State Prison - Solano in Vacaville, California, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the California Board of Parole Hearing's ("BPH") November 18, 2002, decision to deny him parole. Petitioner has paid the filing fee.

BACKGROUND

Petitioner pleaded guilty in the Superior Court of the State of California in and for Santa Clara County to second degree murder with the use of a firearm, and on or about November 12, 1985, was sentenced to seventeen years to life in state prison. (Pet. i.)

According to the petition, petitioner's base term was to expire on November

1 14, 2002. Four days after the expiration of the base term, on November 18, 2002,
2 the BPH denied petitioner release on parole and deferred his maximum eligible
3 parole base term release for two years. (Pet. iii.).

4 Petitioner alleges that he fully exhausted his administrative appeals. He then
5 filed a state habeas petition in the Santa Clara County Superior Court which denied
6 the petition on January 4, 2005. The California Court of Appeal denied the petition
7 on April 28, 2006, and the Supreme Court of California denied review on July 19,
8 2006. Petitioner filed the instant federal habeas petition on June 12, 2007.

10 DISCUSSION

11 A. Standard of Review

12 This court may entertain a petition for a writ of habeas corpus “in behalf of a
13 person in custody pursuant to the judgment of a State court only on the ground that
14 he is in custody in violation of the Constitution or laws or treaties of the United
15 States.” 28 U.S.C. § 2254(a).

16 It shall “award the writ or issue an order directing the respondent to show
17 cause why the writ should not be granted, unless it appears from the application that
18 the applicant or person detained is not entitled thereto.” Id. § 2243.

19 B. Legal Claims

20 Petitioner claims that the BPH’s November 18, 2002, decision finding him
21 not suitable for parole denies him the terms and benefits of his plea agreement and
22 thereby violate due process and equal protection. Liberally construed, petitioner’s
23 claims appear cognizable under § 2254 and merit an answer from respondent.

25 CONCLUSION

26 For the foregoing reasons and for good cause shown,

27 1. The clerk shall serve by certified mail a copy of this order and the
28 petition and all attachments thereto on respondent and respondent’s attorney, the

1 Attorney General of the State of California. The clerk also shall serve a copy of this
2 order on petitioner.

3 2. Respondent shall file with the court and serve on petitioner, within
4 **ninety (90) days** of the issuance of this order, an answer conforming in all respects
5 to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
6 habeas corpus should not be issued. Respondent shall file with the answer and serve
7 on petitioner a copy of all portions of the state trial record that have been transcribed
8 previously and that are relevant to a determination of the issues presented by the
9 petition.

10 If petitioner wishes to respond to the answer, he shall do so by filing a
11 traverse with the court and serving it on respondent within **forty-five (45) days** of
12 his receipt of the answer.

13 3. Respondent may file a motion to dismiss on procedural grounds in lieu
14 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
15 Governing Section 2254 Cases. If respondent files such a motion, petitioner shall
16 file with the court and serve on respondent an opposition or statement of non-
17 opposition within **forty-five (45) days** of receipt of the motion, and respondent shall
18 file with the court and serve on petitioner a reply within **fifteen (15) days** of receipt
19 of any opposition.

20 4. Petitioner is reminded that all communications with the court must be
21 served on respondent by mailing a true copy of the document to respondent's
22 counsel. Petitioner must also keep the court and all parties informed of any change
23 of address.

24
25 DATED: July 25 2007


26 JAMES WARE
United States District Judge